

# Removing the Cement from Hungary's Constitutional Edifice

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The possible victory of Hungary's united opposition in the parliamentary elections in April next year tests our understanding of democracy, the rule of law and human rights – the European Union's foundational values, enshrined in Article 2 of the EU-Treaty. In a 2019 [article](#) for Verfassungsblog I argued that such a victory would prove the weakness of much public discussion about “populism” and how to deal with it. This symposium gives us a welcome chance to advocate for better communication on the nature of the problems Hungary faces and to prepare for one of several post-election scenarios.

What is at play? If the united opposition is successful, its leader Péter Márki-Zay plans to establish a new constitution to restore democracy. But if it does not win a 2/3 majority of seats, as is likely, there is no path to such renewal or correction under the current constitution. As Márki-Zay [pointed out](#), a complete constitutional new start would be required.

How could this work then and how should EU partners prepare for such an eventuality? Let me start with a basic assumption: I think constitutional lawyers can accept the legitimacy of a fresh constitutional start when a country overcomes dictatorship. If, for example, the Belarusian regime ended, no democratically-minded lawyer would argue that a new administration would be required to build a transition onto the current constitution if it stood in the way of democracy.

Hungary, however, is not Belarus. As András Jakab [rightly points out](#), it is not a full-blown dictatorship, but rather a defective democracy or hybrid regime. He concludes that a path of complete constitutional renewal, disregarding the defective current constitution, is doctrinally unacceptable and politically risky. Gabor Halmai [posits the opposite argument](#). These two articles sketch the field of contention.

## How Damaged is the Constitution – Could it be Healed from Within?

It seems to me that we are asking two questions: First, is Hungary's constitutional system so damaged that it no longer reflects the core tenets of democratic constitutionalism? My short answer is, yes, but the case needs to be made comprehensively. The second question is: Could the current constitution be repaired although it is set-up to impede repair? My short answer is: It depends on the post-election context and we should not jump too easily to leave the current legal framework.

In more detail: I see strong indicators of a deeply damaged constitutional system, but such a weighty question needs a more detailed answer than we can give in blog posts. What we need is a comprehensive damage assessment.

The first indication of significant defect in the current constitution is the **democratic deficit** in the way it was adopted. The writing of a new constitution played no role in the FIDESZ election campaign at the 2010 parliamentary elections. The party only embarked on this course when it unexpectedly gained 2/3 majority of seats in parliament (based on winning 52.7% of the votes). Moreover, its public consultation process was not genuine and the new constitution was not put to a referendum.

At the time, the Venice Commission [noted](#):

“It is regrettable that the constitution-making process, including the drafting and the final adoption of the new Constitution, has been affected by lack of transparency, shortcomings in the dialogue between the majority and the opposition, the insufficient opportunities for an adequate public debate, and a very tight timeframe.”

In short, it was a shotgun process exploiting the surprise 2/3 majority. It is worth noting that a new non-Fidesz government could act in a way that stands in marked contrast to this approach. By making constitutional change a campaign issue it is already off to a better start. As a result, Hungarians know what is on the table.

A second indication is the **substantive democracy deficit** in the current constitution which closed the space for majority decision in many instances, triggering our [symposium debate](#). As the Venice Commission noted in 2011:

“The functionality of a democratic system is rooted in its permanent ability to change. The more policy issues are transferred beyond the powers of simple majority, the less significance will future elections have and the more possibilities does a two-third majority have of cementing its political preferences and the country’s legal order.”

## A Democracy Problem is a Human Rights Problem

A democracy problem is of course a human rights problem as well. Let’s hear the Venice Commission once more:

“Elections, which, according to Article 3 of the First Protocol to the ECHR, should guarantee the ‘expression of the opinion of the people in the choice of the legislator’, would become meaningless if the legislator would not be able to change important aspects of the legislation that should have been enacted with a simple majority. When not only the fundamental principles but also very specific and detailed rules on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk.”

We all know the Venice Commission. It is not a noisy human rights organization, but a rather conservative assembly of elderly constitutional experts. If it says the

constitution “cements” the political space that should be contested and there are “far too many” subject matters regulated in cardinal laws, it is its polite way of saying that there is a big problem. Of course, the problems did not end in 2011. In the years since, the Venice Commission and many other bodies have expressed serious, legitimate concerns on a wide range of human rights, rule of law and democracy issues.

The cementing of institutions and policies has had [knock-on effects](#) that have resulted in more cementing. For example, the faulty law on the media council resulted in the appointment of a very biased body, which led to state media becoming blatantly partisan in favour of the ruling party. An essential tenet of democratic elections, a pluralistic media and a degree of balance in particular by public media, has been violated for a decade. And elections themselves are no longer fair, as [noted](#) by the OSCE/ODIHR, Europe’s leading election watchdog.

## **The Opposition Should re-open Democratic Competition for All Sides**

We have a system then in which the cards are stacked against the opposition, making it difficult for it to win, and, if it does, to be able to decide very much and change policies. András L. Pap [poses the question](#): What would the opposition aim to achieve? The answer is it should aim to open up the democratic space, to remove the cement. While as an ideological rainbow coalition the opposition has no shared ideological position, it must aim to restore meaningful democratic contestation in which ideological viewpoints can, once again compete freely and fairly.

This will require the application of some surgical measures, such as abolishing the abused concept of cardinal laws, which requires that laws can only be changed by a two-third vote in parliament. This would have the advantage of carrying no specific ideological baggage. It would merely open the way for elected governments to determine policy.

What about the second question: Could the current constitution be repaired? It could be argued that the question is not important if we are convinced that the constitution is deeply damaged. However, in the interest of the rule of law, we should not be too trigger-happy in shooting down formal legality, even if the constitution is deeply flawed, not least because this could set a dangerous precedent.

It seems too early to have a clear view on this. Change that could be achieved under the current constitution depends, to a large extent, on the political context after the elections. Does the fact that FIDESZ appointed so many loyal judges mean they will sabotage the new government or would their outlook change once power had changed hands? Could the Constitutional Court be open to accept arguments for constitutional change based on the constitution, such as to ensure the right to vote (implying that it is meaningful), Article 7, [as Kim Lane Scheppele suggests](#), or the right to resist unlawful measures, as others have proposed?

These matters can only be judged in the political context of the post-election period. If FIDESZ expands its election manipulation – already present in the totally biased public media – to voting and counting fraud, the situation will look different to a clear, accepted, opposition victory.

Thinking through scenarios helps us to think about what we should do today, especially in terms of public communication. The opposition is convinced of the case for changing the constitution, so it is right to raise it now and make it an explicit aspect of its political platform. Nobody can be surprised if it embarks on constitutional change after the elections.

## **The EU Needs to Talk Democracy and Human Rights – Not only Rule of Law**

At the international level, there needs to be more thinking about potential scenarios in Hungary. Here I come back to my long-standing criticism of the way many policy-makers, political scientists and journalists have talked about FIDESZ and similar parties.

It starts with the facile way that people accepted Orban's framing of an "illiberal democracy". As we have seen in the articles of this symposium, the problems Hungary faces have as much to do with democracy as with liberalism. If we keep priming the public to think that Hungary has a liberalism problem, but no democracy problem, conflict that may break out after the April 2022 elections will be hard to understand. People will wonder: If the opposition won and the country is a democracy, why don't they just make Hungary liberal again? Why are they making a fuss about the constitution?

Political scientists and journalists keep claiming that there is a populist way of politics based on majoritarianism versus a liberal way based on checks-and-balances that limit majority decision. If this was so, it would be easy for the opposition if it gained the majority. It could change course by majority, as FIDESZ did previously.

But it could not, because the explanation is wrong. FIDESZ did not adopt some special populist brand of democracy, it has pursued an authoritarian course of politics ever since it won elections in 2010. It used all the levers – elections, courts, media – to concentrate power, making it as hard as possible for any competitor to come to office. As I explained in [more detail](#) elsewhere, it is merely a [power grab](#) – not very interesting from a theoretical point of view, but dangerous in practice.

FIDESZ pretends to represent the majority of Hungarians as long as it wins (flawed) elections. Once it loses, the party will withdraw behind the cemented barricades of legal norms to escape majority will. It will talk checks and balances, but there is no balance. Only checks in case another party wins elections.

If we buy into this framing, we will find ourselves, from one day to the next, on the flipside of the argument: We will argue that democratic majority should matter and FIDESZ will insist on the rule of law. The EU and the member states need to adopt a

more consistent signaling on all the accumulated problems of Hungarian politics, not only the rule of law, in order to take a credible position after the elections.

The bottom-line should be this: FIDESZ has turned the political system into a hybrid regime, a defective democracy. If the opposition wins, it has a mandate to restore democracy.

